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GERMAN LEGAL SYSTEM

By

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Well, first of all, I hope there are not too many lawyers here so I don't have to watch my legal language too closely. It's sometimes a little complicated to translate the German terms into English and vice-versa. The subject we have to cover is a rather large one, and of course, I can only touch on it briefly and just cover the highlights of it and I'd like to go right into it.

The French (Napoleonic Code) Legal system, as you all probably know, is a part of the civil law system which covers all of Europe, all of South America, and certain countries of the Near East and the Far East; and in our own country we have it to some extent in Louisiana; and in Canada in the French Providence of Quebec. The common denominator of this system is that it originates and has its background in the Roman law. The same goes for the German legal system.

The main sources of all the civil law systems and particularly the German legal system, are primarily two: the local or tribal customary laws which were developed, by less civilized nations in the early Middle ages and the law developed in the Roman Empire by the Roman scholars in courts, the Pretorian Courts.

Now in as far as Germany is concerned in the early Middle Ages you had only-or almost exlusively-,the so-called "Deutsches Recht"-(the German law-). "Deutsch" means German and "Recht" is the law as a general term. This law was developed by the individual German tribes and in individual German localities. It was a rather primitive type of law, but, sufficient to cover the legal relationships of people who lived in an agricultural society and did not have an extensive foreign trade. That law was developed with some influence of the Canon Law, the Kirchenrecht, the law of the Roman Catholic Church, after about the Thirteenth Century.

The Kirchenrecht, or Canon Law, the law of the Roman Catholic Church, which had also its background to some extent in the Roman Law, influenced to some extent, at least, the local and customary law of the various German tribes. A rather extensive system was developed and you find most of it, or a great part of it, in two famous law books of the Middle Ages. "Der Sachsenspiegel" and "Der Schwabenspiegel" the mirror of the Saxons which was developed in the Thirteenth Century; and the "Schwabenspiegel", the mirror of the Swabeans, which is a restatement of the most important elements of the then-existing German law.

However, in the second part of the Middle Ages, it gradually developed, as the relationships and the economic relationships between the various countries in Europe became closer, to some extent influenced by the crusades, that this local tribal customary law was not sufficient to regulate the relationships of the people among each other. So, gradually in the Thirteenth, Fourteenth, and Fifteenth Century the German states, principalities and little sovereignties that existed at that time, all under the Holy Roman Empire, started to receive the Roman law, which was kept in force and further developed by Italian scholars in the Northern Italian Universities of Parma and Bologna. We speak of the so-called reception of the Roman law. That means that gradually by local legislation and judgments of the local courts, great elements of the Roman law were incorporated into the German law system and primarily laws that dealt with commerce or commercial transactions, contract law and some elements of the Tort Law.

It is generally accepted that by 1495 when the Reichs Kammergericht was established the reception of the Roman law into the German law was completed and from that time on we had a mixture of Germanic and Roman law prevailing in

the German legal system. The Reichs Kammergericht was a type of supreme court established by Anton Maximillian II for disputes between the various principalities, independent cities and similar sovereignties and that court was instrumental in propagating and spreading the principle of the Roman law.

Even from that time on, although the Roman law was received, the German legal system was a very incoherent one. There were countless independent principalities, cities, and villages that issued their own ordnances and laws at their own courts and developed laws in them and the situation was somewhat similar to what prevails under the common law system. The other great legal system, which we have in the English-speaking countries, where for example in the United States you have forty-eight State laws and the Federal law and the situation is not always very uncomplicated.

Efforts were then gradually made to somehow get the law together and to find out what the law actually was. In the Eighteenth Century, in the period of Enlightenment, under Frederick the Great, the first major effort was made in that direction to codify and put together all the laws then prevailing. From that time on, from the middle of the Eighteenth Century, the great period of codifications of the German law began.

The first of these great codes was "Das Preusische Landrecht", the Prussian code. Following the example of Frederick the Great, the Austrian emperors, the Holy Roman Emperors at that time, also established commissions which worked for over thirty years and finally came up with the Allgemeine Burgerliche Gesetzbuch of 1811, the common civil code of Austria, which was the second of the great German Codes. The commission worked for about thirty or forty years; had a number of drafts ready and they were finally enacted.

Around 1800, Napoleon got the same idea and started to codify the French law. Out of this came in 1803 the famous and very instrumental "Code Napoleon" which was widely imitated in a great number of countries and influenced the codifications in the rest of Europe to a large extent.

In Germany proper, efforts to further codify the laws in the other states were somehow lagging because you had that great variety of states and each sovereign was very jealous of his perogatives. Finally, you might remember, shortly before the German Reich was founded in 1871, we had for a few years the "Nord Deutsche Bund", the Northern German association of states, which was a loose confederation of German states. They began work on the codification of the criminal law in 1870 and that criminal code was finally, in the following year, adopted as the criminal code of the German Reich. So, from 1871 you have the first great German code, the "Straf Gesetzbuch". Straf means penalty or criminal, Gesetz means statute and Buch means book or code, 1871.

This was followed in 1877 by the "Strafprozessordnung", the code of criminal procedure, 1879, the code of civil procedure; 1897, the commercial code or "Handelsgesetzbuch" and then finally in 1896, after almost thirty years of work on it; the great German civil code the "Burgerliche Gesetzbuch" (BGB) was adopted with an effective date of January 1, 1900. These are the five major German codes on which most of the German law is anchored.

Now these codes with minor amendments are still in effect and are the law, the most important law, of Germany today. They were continued by the Weimar Constitution. Under Hitler there were some changes, which were

then to a large extent repealed by the occupation authorities. Finally under the Constitution of 1949 of the Free German Republic, these codes were thus continued in force.

In addition you have, as far as judicial matters are concerned, a very important law, which also was amended from time to time, but basically still is in effect. It is the "Gerichts Verfassungs Gesetz", the law about the constitution of courts. I'm sure you aren't used to the German composite words-they are rather long-Gericht means court; Verfassung means constitution and Gesetz means statute. "Gerichtsverfassungsgesetz" of 1877.

In addition to that - to those five major codes of which I have just wanted to touch briefly-(the "BGB" is the most important one), there are of course numerous other statutes. These cover matters of specific importance and significance to regulate certain matters that arose after the codes were made, as the need came up, for example, the "Automobil-haftrichtesgesetz", liability for motor cars, and laws concerning electricity and all sorts of other laws; but those are the basic ones and that's the most important law of Germany.

The "Burgerlichesgesetzbuch" (or Burgergesetzbuch) has two thousand, three hundred and eighty five (2,385) paragraphen or sections. You will find that the German codes, if you ever have a chance to read them, go into very much detail. Their sentences and paragraphs, however, are very short and to the point, contrary to administrative regulations in Germany, which are almost impossible to read. The German codes are very clear and concise. You have short sentences and they regulate matters in great detail. The reason is that under the German legal concept, it is only

the Legislature that makes laws. The courts do not make laws. There are no judge-made laws and the significance of the courts in developing the law is of far less extent than under the common-law system. There's no comparison at all; the judges will never go beyond their very limited authority and try to inject new legal principles into the law. Everything starts with codes or with the written laws and they argue from them rather than arguing from precedent and code decisions as the common law lawyer is used to.

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The Burger Gesetzbuch starts off with an Anführungsgesetz, an introductory law, which maintains in force certain legislation of the states prior to the constitution of 1871. Then, it has an Allgemeine Teil, general principles, which emunciate the general principles guiding the law of--the civil code; then, the next section is the law of obligations, contract and tort law; then, the Sachenrecht property law--but--real property and personal property; and, fourth, the Familienrecht, the law of family, law of marriage, divorce, children, and so forth; and finally, the Erbrecht, the inheritance law.

Now, as to the present legislative process, we have to consider for a little while the constitution of the German Federal Republic, the constitution, or Grundgesetz, as it's called, of 1949. The Germans at that time, in 1949, were not eager to establish the Federal Republic, because they felt that this would mean a break with Eastern Germany and have bad political consequences; so they wouldn't call their constitution a Verfassung which is the name for a constitution but a Grundgesetz, basic law--Grund means basis, Gesetz, law.

Under the Basic Law 1949, first of all, in the transitory provisions', all the existing laws of Germany were made a part of the German legal system.

They were taken over except to the extent they are in conflict with the Grundgesetz; otherwise, they remained in force. As to the new legislation, the federal constitution provides that laws are to be made by both the Federal Republic and by the Länder. Länd is a state, the component parts which you find here of the German Federal Republic.

The constitution provides that the legislative power is primarily vested in the states (Länder), except to the extent that the powers of the Federal Government to make laws are specifically enumerated in the constitution. However, it then procedes to enumerate practically everything, so that all important legislation is vested in the authority of the Federal Republic.

To give you some idea what subjects are covered by it, the Federal Government has two legislative functions: the exclusive authority to legislate, the concurrent legislative power; and then a third one, the power to issue framework legislation in certain fields which then will be implemented or may be implemented by the Länder. Under the exclusive legislative power of the Federal Republic are matters like foreign relations, citizenship, monetary system, taxes, federal railroads and airways, postal system, and so forth.

In the concurrent jurisdiction of the Federal Republic which operates the following way: the constitution provides that in that field of concurrent legislation, the Länder may act unless the Federal Republic, the Bund, has pre-empted the field. When the Bund legislates in it, the Länder can't. It's similar to our constitution in that respect. And, in the concurrent legislative power are included all the codes we enumerated here, the Federal-Burglicherecht, criminal law, criminal procedure, constitution of courts and so forth.

Then other matters are matters of refugees and expellees, public welfare, citizenship in the Länder, matters of economic importance, labor law et cetera. We will see from that--that it leaves very little legislative power to the Land. They apply primarily to enact legislation concerning taxation, to run their own governments and matters of local, public welfare and police power type of matters.

One principle which is stated very succinctly and similar to the old drama of constitutions is Article 31 which says Bundesrecht, Landrecht, federal law breaks land law. Simply like that, whenever a Federal law is in conflict with a Land law, the Federal law prevails. Well, I guess that's all you have to know about the legislative process. You might get some more in another lecture.

If we go now over to the judicial process, which you might be more interested in, the constitution provides that the judicial power is to be exercised by two systems: the system of Federal courts and Land courts. As to the Federal courts, the constitution provides for the establishment of the Bundesverfassungsgerichtshof as the supreme court in constitution matters. Bundes--it means--a literal translation is Bundes,--federal constitutional court. Then in addition to that federal constitutional court, you have the Oberstebundesgericht, the supreme federal court which, is supposed to safeguard the unity of the German legal system whenever conflicts arise. Then you have a system of Oberebundesgerichte, superior federal courts, in matters like civil law, administrative law, labor and public welfare law, and finance law. The most important of these courts is the Federal constitutional court, which is the one that passes on the constitutionality of Federal and Land legislation. As a very important part of its activity, it is

supposed to settle conflicts of jurisdiction between Federal agencies amongst themselves and Federal and Land agencies.

The Federal court system, however, is in daily life not of very much importance. The law of Germany is really administered by the courts of the various states, the courts of the Länder. Now, they apply the civil law, the criminal law, and commercial law, and all the other legislation. The Land courts do not confine themselves, naturally, to interpretation and judgments on the basis of Land legislation, but they apply those Federal codes as enumerated in all Federal legislation.

They are Land courts because they are established within the framework of the Gerichtsverfassungsgesetz by the Länder, the judges are appointed by the state governments, and paid by the state governments and promoted and so forth; but for all practical purposes, they apply almost exclusively Federal law.

Now here is the system of the ordinary German courts, which we will run into. Starting from the bottom--we'll forget about the justices of the peace which they have in some Lander--you have the Amtsgericht. That is the lowest court of first impression, similar to our municipal courts and county courts. It deals with matters up to 2,000 mark in value. In addition to that it has a great variety of original jurisdictional first impression, such as landlord and tennant proceedings and the great body of noncontentious matters such as inheritance matters, family relations, and so forth. These courts you will find in every county and in every city, in the major cities you'll find more than one; and that's where the bulk of the German legal cases are being handled.

On top of the Amtsgericht is the Landes Gericht, the land court, which is similar to our district courts, if you want to compare them. There are more than one in most of the German Länder, maybe in Land Bremen there'll be only one, but in Bavaria there are a great number. These district courts have jurisdiction in matters about 2,000 Deutsche Marks and matters of divorce and other similar matters of more importance. In addition to that, they have an appellate division which handles appeals from these Amtsgerichte. I want to add that both the Amtsgerichte and the Landgesrichte have both civil and criminal jurisdiction.

From the Landesgerichte, there is an appeal then to the Oberlandesgericht. There is usually only one Oberlandesgericht in each German state, except in a larger state such as Bavaria, which has three. These are pure courts of appeals, except that they have minor jurisdiction in--first impressions, such as dissolution of entailed estates and similar matters; and I believe, also, they are supposed to handle cases of treason. That's their part--they are under federal jurisdiction. Now, in Bavaria, which has always had to have something extra because they have three Oberlandesgerichte, they have one supreme court, the Oberstebaverischegericht, which is a supreme court, which is supposed to tie up different opinions between the three Oberlandesgerichte.

Well, assuming you go into one of those courts and observe the operation of the German courts, you'll find quite a bit of difference from the courts you are used to in this country. You'll find, first of all, the following people operating in those courts, and you might want to know, because you might have to get in touch with them at various times.

The judge is der Richter. Now, you'll never address him as such, because he's always going to have some sort of title. As the years go by and as people--as they progress in the German civil service, he'll start off as an Amtsrichter, then become an Amtsgerichtsrat, later on a Landerichtsrat, and then Oberlandesgerichtsrat, and it goes on like that. And that's the title you have to use. You have to be very watchful about that because they're very jealous of their titles. That's part of their pay.

The prosecutor, who will be attached to the court, but as an independent agency, not subject to the supervision of the court, is the Staatsanwalt, the attorney of the state. Private parties will be represented by attorneys at law, which are called Rechtsanwalt.

And then you finally find a man which has very little social standing in this country but quite a considerable one in Germany and in Austria, der Notare, notary public. There are all sorts and varieties of Notare but most of them are graduate lawyers, Doctors of Law, who need many years of practice before they are appointed as notary publics. They have the same role as here, to authenticate signatures, and they notarize documents. However, they also draft legal documents, and they are primarily engaged in matters of real estate, transfers of real property and so forth and are usually very prosperous members of the legal profession.

Now, if you see the Richter, the judge, in action, you'll find that his role in the proceedings is very different from the one under the common law system. Under the common law, the judge usually just sits there and lets the parties carry on the proceedings. We have, in this country and in England, a strictly adversary type of proceedings. That means the attorneys of both parties, the district attorney and so on--they are supposed to prepare the cases, then present them before the

judge. And the judge only makes the rulings whether a question is proper, whether a certain type of evidence is to be admitted or not, and then finally, when it's a jury trial, he sums it up. But when it's a trial just before the judge, well he ends the proceedings and then writes his judgment.

In Germany it's entirely different. It is the judge who carries on the investigation of the case. Now, we don't have a pure investigatory type of proceedings in Germany any more, as it used to be to a large extent during the Middle Ages. They still maintain that they have a certain type of adversary proceedings, but in reality and practice, it works out the following way. Assuming that you want to sue somebody, your attorney will prepare a complaint and in the complaint he'll state a case and then say, "I want the following witnesses who can testify as to whatever I have stated in my complaint." The other party, the defendant, might answer that complaint in a brief and say, "It isn't true. This is the position I maintain, and the following witnesses and the following documents will support my case." Then it will come to trial, and the evidence will then be taken by the judge. All witnesses are witnesses of the court rather than of the parties, and--the judge will then interrogate the witnesses as to their knowledge of the facts which are alleged in the complaint and in the brief. He will take in all the documentary evidence, go out to take a view, and so forth. And, usually, he's a very experienced man, and he asks searching questions: and for that reason, you will need very little cross examination. The thing that strikes American lawyers most when they come over there is how comparatively little cross examination is being used. It is a part of German law; the law attorneys have a right to cross examine witnesses, but they really don't have to do too much of it; and they wouldn't get too much out of it, because the judge before them has pretty much exhausted the knowledge of the witness before him.

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So, the role is reversed. While under the common law system the judge watches the lawyers; under the civil law system, the lawyers watch the judge. They watch out whether he does everything proper, has asked the proper questions, has gotten everything out of it, and then they supplement what the judge is doing or object to what the judge is doing in their cross-examination of the witness.

I mentioned before that there is no judge-made law, and the judges are not too interested in really establishing a great legal reputation by developing legal principles. They are technicians. They have not the role, which some of them, who have been over in the United States, and know the common law system--admire and envy so much--of the regal judge, the judge who sits on a pedestal as in this country and is very much separated from the administrative process, and a judge over it, and has less tedious routine work to do in their opinion.

Although there is a separation of power under the German legal system, that means you have the three branches of government--administrative or executive, legislative, and judicial--the judiciary is subordinated to the Ministry of Justice. That means their affairs, their pay, and so forth comes from the executive branch of the government. Now, in matters of making decisions, they are, of course, completely independent. They also cannot be removed against their will except by a judgment of a disciplinary courts. They can be transferred only--and if they want to, if there's a vacancy somewhere else which provides for promotion. They may apply for it, and, then a committee

of judges will propose three of the candidates, usually, to the Minister of Justice, who then has the power to select one. But, basically, they are civil servants like you and I, and do not have any different role from the other civil servants in Germany. They are Beamte.

As a matter of fact, promotions in the office of the prosecutor are much faster; and usually in selection of legal personnel, people with better connections and perhaps more ability will be taken in into the office of the prosecutor, which carries a little higher prestige than the judiciary. And, then, they interchange; the judges might switch over to the prosecution staff and vice-versa, and thereby gain in their career.

Now, the Staatsanwaltschaft, the staatsanwalt, or district attorney, is an official charged with the prosecution of crimes and works under the direct control and guidance of the state Minister of Justice. At the local level you might--at some of the Antsgericht--you might not even find a Staatsanwalt present. He might sit at the Landesgericht and have some local man or official handle his matters for him and every once in a while visit it. But at each Landesgericht, you'll have an Oberstaatsanwalt, who is in charge of all prosecutions of criminal matters before the court and has a staff of Staatsanwälte under him.

And as you go up to the Oberlandesgericht, there'll be a General Staatsanwalt or Oberstaatsanwalt in charge there. They are also civil servants. They start when they are maybe twenty-six or twenty-seven years old in the civil service and then progress through a scale. There's no election or anything of that type over there. The Rechtsanwalt is the only attorney at law who practices before the courts, and I talked about the notary before.

And now a little bit about the legal education which you ought to know. All lawyers have to go first through the secondary school system which is the Gymnasium or the Realgymnasium. They are through with that about the age of nineteen. Then they would go to the law school for three years, and after three years they have to take their first state examination, which is the referenda examination.

After a young man has passed the referenda examination, he becomes a Referendar, which means he goes through his clerkships through the courts, which usually lasts about three years. And, then he gets his really first class, practical education because he's transferred as a law clerk from one judge to the other. He might spend a few months at a criminal court, then transfer to a commercial court, to a civil court; they go through the whole thing. They work in lawyers offices; they work in administrative agencies. And after they have gone through that training period, then they take their second examination which is the Assessor examination. That really makes them final members of the bar. And after another two or three years as working as Assessors here in law offices or in the courts, then they finally become Staatsanwälte, Rechtsanwälte, or Richter whatever the case might be. This practical education is what really makes the German lawyer. It's not, I would say, so much the law school, where the just gets the theory of the law, but that practical trial-and -error period, through which he has to go through at comparatively very little pay, that really makes them quite qualified and proficient in their professions. And, I think, on the whole, the German bar is in excellent shape, and there are very good men in there.

UNIDENTIFIED: May I ask a question?

AT [redacted] Yes

UNIDENTIFIED: While on that point, what about remuneration and fees? Are the attorneys at liberty to charge according to their experience in case?

AT [redacted] Well, they are, but there are certain tariffs. Rechtsanwalt Tarife: for each step they take according to the value of the case, they are being paid. And the procedure is the following: assuming the lawyer files a complaint, then goes to the various court sessions, files further briefs, and so on, he will then be paid on a certain scale according tothe value of the subject matter. If he wins the case, the losing party has to pay the costs of the winning attorney and its own attorney. Of course, certain attorneys, who can afford it, can make their private arrangements with their clients and ask for more, however, within limits. They can't go too far, otherwise the client can go the the Chamber of Attorneys and complain about it and he can even go to the courts to ask for an adjustment of the fees that there are claimed from him.

UNIDENTIFIED: I'm not quite clear--are the Rechtsanwalte, or attorneys, privately engaged?

AT [redacted] All Rechtsanwalte are privately engaged in the practice of law, but whatever their fees are, the losing party in the lawsuit has to pay it.

UNIDENTIFIED: But, these tariffs you speak of...

AT [redacted] The tariffs are established as guides, and they are minimum tariffs.

UNIDENTIFIED: We have nothing like that have we in this country?..

AT [redacted] No, not anything like it. For example, another thing that differs are contingent fees, which are very much the vogue here in this country. Particularly in accident cases these are frowned upon in Germany. A lawyer is not supposed to be in partnership, so to speak, with his client. He renders his professional services and is supposed to be paid for that. He's not to make any arrangement, at least in some sections, which requires that he take less than the fee prescribed by the tariffs. However, he may take more,--might cause finally that the client is unable to pay, so he might not insist that the client pay it. But there shouldn't be any cutthroat competition, and that's one of the main purposes of the tariff legislation.

MODERATOR: Are there any more questions?

AT [redacted] I know they have different kinds of procedures, I don't know if they still have it, but what about this Schöffengericht? (lay assessor's court)

AT [redacted] Oh, yes, I wanted to go into that. I'm glad you asked me this question because this is something that is usually of interest. First of all, I would say in civil matters, there is no jury system. In no civil case will you find a jury system. Whatever jury system is left you find in the criminal cases. Now, there is lay participation in the German courts even in civil cases in some matters, in commercial courts and so on. In criminal cases, you have three types of crimes: misdemeanors, intermediate crimes and capital crimes. Now misdemeanors will come before the judge; there won't be any laymen there. Intermediate crimes and some of the more

severe crimes will go before the Schöffengericht, which is a mixed court of two professional judges and two lay judges, which sit both as judges on the facts and the law. There is no division like in this country on the jury between fact--the jury passing on questions of fact, and the judge on the questions of law. Now, then for capital crimes, you have a jury system similar to the one in the United States, until 1925. That means a twelve-man jury sitting on the jury bank, being asked questions of fact, guilty or not guilty, and so forth, and a bank of three judges, one, the presiding one, handling the case as the judges would here. That system didn't work out either in Germany or in Austria for some reason or other. Apparently juries were very reluctant to pass sentences--major sentences on criminals and there were very many acquittals. So in 1925 a new type of Schwurgericht, which is a jury court, was established. Schwur or Schwören, means to render an oath, a man sworn to do justice--Schwörling, which consisted of three judges and six jurors, lay men, sitting as one court, not separated, to pass on questions of law and fact.

Well, then Hitler came, and he abolished those courts altogether, and there was no jury court at all. Well, after Hitler came we were faced with the problem over in Germany, whether to re-establish those courts, and there was a demand for them. In 1946, the American Military Government for our zone passed the Statsrechtspflege, of 1946--their revision of the German code of criminal procedure, taking out all the Nazi legislation out of it. In that law, they gave authority to the Land Ministers of Justice to reintroduce the jury system at their own free will, whenever they felt they were ready for it. So the question arose again, and the dispute still was all this time, whether the old fashioned jury court or the new one composed of judges and prosecutors together was the better one. Well,

at that time, in 1946, the Minister-President, and Minister of Justice was Hoegner, who is now again Minister of Justice, a Social-Democrat, who spent the war years as a refugee in Switzerland and was very much impressed by the Swiss system. So he introduced the old-fashioned twelve-man jury court in Bavaria. In Baden-Württemberg and Hesse and the other places, they refused to take that system and went back to the 1925 system of a mixed court, three to six, to pass on matters of fact and law together. Well, it showed up very shortly, I think, and our experience has shown that the jury court in Bavaria again didn't work properly. Somehow the German mentality doesn't fit too well to the jury court. Immediately, as soon as those juries were introduced, complaints started all over again. Hoegner was constantly under attack for those courts. Whether they have revised them now, I really don't know. There might be a late development, but I think it's still in effect.

AT MODERATOR: Well, [redacted]

AT [redacted] I was curious about this precedent, the judges position, you say is not, the judge is not a perpetuator of the law, at least he doesn't set any precedent...

AT [redacted] Well, I would say the following, the principle of stare decisis, which you might have heard, which is the Anglo-Saxon system that you follow precedent.

AT [redacted] That stare decisis system does not exist in Germany as such. That means a lower court does not have to follow precedent, if they feel that on the facts of this case they want to reach a different conclusion, that the Oberlandesgericht have reached in another similar case.

They didn't even have to follow the supreme court under the old German Reich, The Reichsgericht, which was the only Federal court at that time, the supreme court. But in fact, they did so. In very rare instances would a court deviate from a known decision of the Reichsgericht or even of its Oberlandesgericht, under which supervision it worked, for a very simple reason.

UNIDENTIFIED: Stare decisia does exist then?

AT [redacted] In practice it does exist, that means, the judge is only a human being; he'll follow the line of least resistance if he has a case that covers the situation perfectly. Unless he has very strong opinions about it, he won't deviate from it because he knows an appeal is going to be reversed by the court. Unless he wants to make a record for himself as an obstreperous fellow, he'll follow precedent.

UNIDENTIFIED: So, that's a practical consideration?

AT [redacted] That's a practical consideration. In addition to that, when it comes to promotion, that's another practical consideration. A fellow like that won't get very far. But, another practical effect of that thing is that while under our common law system here, at least in our agency, I know, we always run for a case. We've got to find a case, otherwise you can't do a darn thing about it. The German judges don't worry so much about their case. They first go to their book, to the Burgerliche-gesetzbuch and see what you find there. It's very easy system towork.

UNIDENTIFIED: Well, I suggest that it's so clearly written that...

AT [redacted] It is first of all that you have a very short paragraph in the annotated editions of the code, maybe two lines or only one line.

Then you might find two or three pages of comments on it, citing court decisions of various courts, usually of the Reichsgericht, and higher courts which give and break down, practically every work of that section and explain it. Now, then, a judge will go there and look it up and see whether there are any cases which fit that situation somehow.

UNIDENTIFIED: Precedents

AT [redacted] He might, if it's a very important case, make more research and here there is one important factor I want to mention. The writings of professors, the commentaries of professors, have a very much greater weight over in Germany under the civil law system than they have over here. You find, practically for every major piece of legislation, a commentary written usually by one or two law school professors, which will just summarize everything on the subject. And those commentaries are cited as authorities in court decisions. They will rely on them to a great extent.

UNIDENTIFIED: In other words, then, a lawyer over there will spend less time citing precedents perhaps than...

AT [redacted] Yes

UNIDENTIFIED: And spend more time on the facts, I suppose?

AT [redacted] More--and for example, another thing, in the courts Amtsgericht or Landgericht, when a case first comes up, the lawyers will not be able to talk too much about the law. As a matter of fact, they have the principle jura novit curia, which is a Latin word, the courts knows the law. Only on appeal, do you discuss the law. Before a court of first impression, you present the facts within the framework of a certain legal theory you have. Because, at least in civil cases, it is to some extent the way the parties frame the issues that the judge then handles the case.

This is a distinction from the pure investigatory process you have in criminal cases. In criminal cases, the judge is charged with a duty to find--to search for the truth, to find the absolute truth. It's up to him, he can summon his own witnesses, he's in charge of finding the truth. In civil cases, theoretically, he's charged only to find the relevant truths on the facts as presented to him and within the framework of the legal issues as presented to him by the parties.

AT MODERATOR: Very good, [redacted] I think, had a question.

AT [redacted] Well, I was curious to know what kind of effect the Nürenberg trials had on purely a point of view of systems. What kind of effect the Nürenberg trials had on the German people, not--discounting the moral issues, but a...

AT [redacted] As far as effect on the legal system is concerned? Well, of course this is an a--I presume that most Germans followed the trials, and they were run on the common law system.

AT [redacted] Yes, but I don't think that it made too much of an impression. Frankly I don't think any impression at all. I believe very strongly that most Germans and Europeans feel that their legal system is better than the Anglo-Saxon one because it's more mature. They have what the Anglo-Saxon system is now trying to get; to codify to some extent the law. You have the effort here in the United States of creating uniform law. In various fields they have already been established in Europe. They have a much older legal system, and they're proud of it. And, they don't believe in what they consider our propaganda, that the reason for Hitler's rise to power is their legal system, the fact that they don't have habeas corpus.

I remember very distinctly, when back in '47, the director of the legal division insisted on issuing a law on habeas corpus within the Military Government courts. It was a very limited type of habeas corpus, and he felt it was really something very important, that this would open the eyes of the German people to the terrifically important principle of habeas corpus. Well, what came out was a law that was about twenty pages long. Nobody could understand it not even an American lawyer. It didn't have any effect whatsoever on the German court system, none whatsoever. And actually, they don't need a habeas corpus. If you have a democratic government, you don't need it; if you have a dictatorial government, well, no legal system is going to help you. There at least, is their thesis.

And the code of criminal procedure provides in detail about arrests and bail and personal recognizance procedures. And, there are all sorts of safeguards in there according to the law and which are obeyed. A man arrested by the police, has to be transferred to the next court not later than the following day. He has to be placed before a judge immediately, but not later than 24 hours. The judge then decides whether he should be released completely or released on bail. Bail is rather rare, because most people who commit crimes have no money. So they release him, if it's a minor offense.

Now one of the problems you'll find in Germany is that some people will be held in jail, without bail, for considerable periods, sometimes over a year under pre-trial confinement. In capital cases, it almost invariably happens if the investigation is difficult. And, I talked to many German prosecutors about it and tried to change that situation, but

it was impossible to do anything about it because the system was as follows. If somebody commits a lesser crime, he's a man in the community, known there, he has a stable residence there, they will arrest him, or won't even arrest him, sometimes just prefer charges against him.

If it's a major crime, a capital crime, they will always keep a man in jail under pre-trial arrest, because they say there are three grounds for keeping a man under arrest under the German code of civil procedure: the danger of repetition of the crime, which is the slight one in most crimes, the other one, the danger of collusion, that means the danger that he might influence witnesses or try to destroy evidence, and the danger of flight, of escape, from the jurisdiction of the German courts. And in major, capital crimes, they always assume automatically that there's a danger of escape. With the present division of Germany, there is a very great danger of escape. So they will keep a man under arrest and under pre-trial investigation. Now, that is something which is different under the German and American civil law system and something that always amazes common lawyers and people coming from the United States.

The institution of the Unterzuchungsrichter, or a judge of the investigation--. If somebody commits murder--or--robbery or a major, capital crime, the police will make the initial investigation. Then it goes to the public prosecutor, who is charged with the investigation initially. He uses for intermediate and lesser crimes the criminal police as his auxiliary organs. He can use them and they are working for him in such a case. If it's a major case, it is assigned then to an Unterzuchungsrichter, a judge of investigation, who completes a complete dossier on the case.

That means he calls in and subpoenas all the witnesses bearing on the case; he collects all the documents. The attorney of the accused is going to come in to him and say, "I want the following witnesses to be heard," and the judge will do that. He makes a complete dossier and then he makes his proposals whether there is sufficient ground to formally charge the man with commission of the crime or whether the investigation should be discontinued. If his report, against which there's also an appeal, is that the case should be taken up before the court, then the public prosecutor will make his accusation. Then the whole dossier goes to the presiding judge of the court, who is a different judge, who will then sit in charge of that trial. And the judge will study the whole dossier. He will be well prepared. He'll have heard all the witnesses--have the written evidence of all the witnesses have said. Then he will go in and will hear every witness again, because all that is in the dossier is just to aid the judge in the trial. Nothing in the dossier can ordinarily be used, with some exceptions, unless that it is repeated in open court. The dossier will give the judge the possibility to ask intelligent questions and really explode a case that has been explored in detail.

Now to come back to this long confinement. Once I investigated a case over there, where a man had been held in pre-trial confinement for about fourteen months. Our prisons officer, who was supposed to watch the prisons said, "We have a man here for so long who has not come before a judge." I investigated the case. "Well," the prosecutor said, "What should I do with it?" This man committed some major offense, I think it was an abortion, that resulted in the death of a woman. And, in the course of it, the suspicion arose that the man was insane. He had to be transferred to an

insane asylum for observation, and was there for that time. "And, don't worry," the prosecutor said, "I mean, we are not going to proceed in the matter unless we have pretty safe grounds to assume that the man has committed a crime." They always use their judgment, the prosecutors. Now that never impresses a common law judge. How can you make up your mind that a man committed a crime? Well, those fellows are civil servants. They don't go out after people. They are not out to establish a record -- a political record or anything of that type. For them it's a routine matter like my complaint cases over at the Labor Board. He handles that matter, the--prosecutor, and if he feels that he has a--that the facts point that the man has committed murder, he'll keep him until the dossier of the Unterzuchungsrichter is completed, and then goes to trial. Now, if he is sentenced...

UNIDENTIFIED: So, that's a functional grand jury...

AT [redacted] Well, it's sort of a functional grand jury. If the man is sentenced then, let's say, to ten years imprisonment, that year will be computed on his sentence, ordinarily, almost invariably. And there're even criminals that prefer to be under pre-trial investigation for a long time. They know they are going to be sentenced and get five years. They might as well spend one year under pre-trial confinement which is easier on them because they have certain privileges which they don't have in a penitentiary, and that one year will be taken off their main sentence. So, it isn't so bad really as it looks from the outside, if you don't know the inner workings of the machinery.